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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re the Marriage of

CHAD MITCHELL BURTON

Respondent,

and

DEBORAH RENEE BURTON

Appellant.

BRIEF OF APPELANT

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I. INTRODUCTION

This appeal arises from the dissolution of a twelve to thirteen-year marriage with children. The Trial Court made several errors relating to parenting and maintenance. In terms of parenting, both mental health professionals who worked on the case recommended a change of primary residential custody from the Wife to the Husband, but that the Wife has a chance to revert to primary custodial parent upon improvement in her emotional condition.

At the hearing after the trial, the Court adopted both parts of that recommendation – the primary custody change and the contingent primary custody change *back*. However, the written parenting plan does not reflect the oral ruling. While the parenting plan includes the primary custody *change*, it omits the contingent *change-back*. There are no provisions that establish how the Wife might resume her previous role as the primary custodial parent upon improvement of her emotional condition. This was an error.

In terms of maintenance, the Trial Court effectively based maintenance on the Husband's future property payments and past family support payments. During the hearing after the trial, the Court correctly concluded that property and maintenance were apples and oranges.

Payments designed to buy-out the Wife's interest in the property awarded to the Husband cannot be counted towards the Husband's maintenance payments.

However, the Trial Court then ignored its own conclusions. It only awarded the Wife six thousand dollars in maintenance because, the Court reasoned, she would be receiving property payments in the future, and had already received family support in the past, thus effectively counting apples as oranges. This was error.

II. ASSIGNMENTS OF ERROR

Evidence

1. *RP 155.*

The Trial Court erred when it refused to let Dr. Poppleton testify.

Parenting

2. Parenting Plan § 3.2. *CP 38.*

The Trial Court erred when it neglected to incorporate provisions in the residential schedule that would allow the Wife to transition back to her previous role as primary residential parent.

3. Findings § 2.19. *CP 18 et seq.*

The Trial Court erred when it made four, single-spaced pages of negative findings about the Wife, but none against the Husband.

Maintenance and Property

4. Decree of Dissolution § 1.3. *CP* 29.

The Trial Court erred when it neglected to enter a money judgment in Favor of the Wife Against the Husband.

5. Decree of Dissolution § 3.7. *CP* 31.

The Trial Court erred when it awarded maintenance in the amount \$1,000 per month for six months commencing June, 2012.

6. Findings § 2.5. *CP* 14.

The Trial Court erred when it established the day of separation as March, 2009.

7. Findings § 2.12(d). *CP* 17.

The Trial Court erred when it found that the marriage was eleven years, ten months.

8. Attorney's Fees

RP 254 *et seq.*

The Trial Court erred when it denied the Wife's request for attorney's fees.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **Whether the Trial Court Should Have Heard Testimony from the Ph.D. Psychologist who Evaluated the Parties and Issued Several Reports Over the Course of a Year.** (Assignment of Error No. 1);
2. **Whether the Parenting Plan Should Have Established Conditions Allowing the Wife to Resume Her Role as Primary**

Custodial Parent, Per the Recommendations of Both Experts and the Court's Own Oral Findings. (Assignment of Error Nos. 1, 2, & 3);

3. **Whether the Findings Regarding the Parenting Plan Should Be Stricken Because They Are Lop-sided and One-Dimensional In Favor of the Husband Against the Wife.** (Assignment of Error No. 3)
4. **Whether the Wife Should Have Been Awarded a Judgment for Her Share of the Community Property.** (Assignment of Error No. 4);
5. **Whether the Maintenance Period Should Have Been Three Years and the Start Date Should Have Been the First Day of the First Full Month After the Date of Entry of the Decree.** (Assignment of Error Nos. 4, 5, 6, & 7);
6. **Whether the Day of Separation Should Have Been the Petition File Date.** (Assignment of Error Nos. 5, 6, & 7);
7. **Whether the Wife Should Have Been Awarded Attorney's Fees on the Basis of Need Versus Ability to Pay.** (Assignment of Error No. 8).
8. **Whether the Wife Should Be Awarded Attorney's Fees for the Cost of This Appeal.**

IV. STATEMENT OF FACTS AND PROCEDURE

Background

This is a marriage of intermediate duration. The parties were married in July, 1997. If the day of separation is the Petition file date,

January 2010, the marriage was twelve years and seven months.¹ During the marriage, by mutual agreement, the Wife was the stay-at-home mother while the Husband was the bread-winner.

The marriage and the separation were characterized by what Dr. Poppleton termed, "Situational Couple Violence."

Chad and Debbie have a history of engaging in *Situational Couple Violence* – resulting from situations or arguments between partners that escalate on occasion into physical violence. Both Chad and Debbie appear to have poor ability to manage their conflicts and anger with each other.

Poppleton Rep. 44. However, Dr. Poppleton also noted that, "on average, Chad has been more potent in his aggression toward Debbie than she has toward him" *Poppleton Rep.* 45.

Maintenance and Property

While the Husband earned approximately \$10,000 per month, net,² the Wife earned approximately zero. *CP* 54. The Husband was a certified financial planner with a radio show, a growing business, and clients in San

¹ In the absence of any specific testimony regarding the day of separation, the day of separation should have been the petition file date.

² The court found that the Husband made \$10,000 net / month. *CP* 17. However, the correct figure is probably \$19,000 / month. The Husband's adjusted gross income for 2011, as reported on his federal income tax return was \$227,786, or \$18,982 / month. *Income Tax Ret. p. 1*. In addition, the Husband reported monthly expenses of \$8,940.37. *Husband's Fin. Decl. p. 1*. The Husband also reported the following annual expenses: Family Support: \$54,000, *RP* 158. Attorney's fees: \$50,000, Dr. Poppleton: \$13,000, Jeff Foster: \$7,000. *Husband's Fin. Decl. p.6.*, for a total of \$124,000 / year or \$10,000 / month. Thus, the Husband's self-reported monthly expenses are about \$19,000 / month, consistent with his income per his federal tax returns. The Wife did not challenge the Husband's \$10,000 figure at trial.

Francisco. *RP* 43. He and his partner each owned 50 % of the business.

RP 44. The Wife had no job skills, but testified to her desire to go back to school to get a four-year degree and become a medical technician. *RP* 203.

The court awarded the Wife maintenance in the amount of \$1,000 per month, for six months. *CP* 31.

The community's largest asset was the Husband's business. The Husband valued his 50 % interest in the business at \$450,000. *CP* 35. According to the Husband, the community had other assets and liabilities for a total value of \$390,992.10. *CP* 35. The Wife did not present evidence regarding the value of the community's assets.

The Court awarded the Wife half the net value of the community. Her biggest award was an "equalizing payment" of \$157,842.50. *CP* 35. This payment was not reduced to judgment. However, an amortization schedule was attached to the decree, which indicated that the Husband was to pay the Wife \$4,500 for 38 months. *CP* 36.

Parenting

The community engaged two parenting experts. One was a Ph.D. psychologist named Dr. Poppleton. The other was an M.A. family therapist named Mr. Foster. The community paid almost \$20,000 to Dr. Poppleton and Mr. Foster. *CP* 35.

Dr. Poppleton was involved in the case for over a year.³ He interviewed both parties on multiple occasions and conducted several interviews with the children and collateral witnesses, including the child's therapist, the Wife's therapist, and Mr. Foster. *Poppleton Rep. 2.* He also reviewed multiple documents and conducted nearly a dozen standardized psychological tests. *Poppleton Rep. 2.* Dr. Poppleton issued five separate reports / letters for a total of sixty-two pages.

Dr. Poppleton's final custody recommendation was to change primary custody from the Wife to the Husband until such time as the Wife could learn to manage her emotions around the children, stop involving them in her fight with the Husband and his significant other, and understand the effects of her behavior on the children. *Poppleton Rep. 60.* If the Wife were able to accomplish this, based on measureable criteria, she should resume her role as primary custodial parent. *Poppleton Rep. 60.*

The other parenting expert was an M.A. family therapist named Mr. Foster. *Foster Rep. 1.* The Foster report doesn't disclose the sources used to form the basis of its recommendation. However, Mr. Foster only issued one report for a total of eleven pages. In his oral testimony, Mr. Foster referred time and again to an incident during which the spouses

³ Dr. Poppleton's first report is dated March 8, 2011. *Poppleton Rep. 1.* The final report is dated March 6, 2012. *Poppleton Rep. 58.*

were arguing on the phone. *RP 11*. Unbeknownst to the Wife, the Husband secretly setup a conference call so that Mr. Foster had a live “wiretap” on the conversation. *RP 11*. Mr. Foster heard the Wife screaming expletives at the Husband at the top of her lungs while the Husband was cool and collected. *RP 11*.

Mr. Foster determined that this call was evidence of the Wife’s bad behavior – “histrionic” – and the Husband’s good behavior – “disengagement.” *RP 12*. He later suggested it was evidence of the Wife’s alienation campaign against the Husband. *RP 34*. Dr. Poppleton, on the other hand, found the conversation an invasion of the Wife’s privacy and another example of the Husband’s deceit and manipulation. *Poppleton Rep. 44* (“Chad has been manipulative (*e.g.* when he conferenced in Jeff Foster, MA, during an argument they were having on the phone and without Debbie’s knowledge.)”

The Foster report recommended that the Wife have supervised visitation with the children for sixty days, but said next to nothing about what should happen after those sixty days. *Foster Rep. 11*. It also recommended that the Husband have primary custody of the baby whose name is “Chase,” but referred to in the report as “Chance.” *Foster Rep. 11*. The report made this recommendation despite the fact that Chase was

not the Husband's son and the Husband, therefore, had no legal claim to custody over him.

The Court denied the Wife's request to call Dr. Poppleton as a witness because the Court was busy the following day and because the Wife might have to pay him. *RP* 32. However, the Poppleton report was admitted into evidence. Dr. Poppleton and his report were referred to throughout the trial. Mr. Foster, on the other hand, was allowed to testify and his report was admitted.

V. ARGUMENT

1. The Court Should Have Heard Testimony from a Ph.D. Psychologist who Evaluated the Parties and Issued Several Reports Over a One Year Period.

The Trial Court should have allowed Dr. Poppleton to testify. The Wife first indicated her interest in calling Dr. Poppleton during her cross examination of the Husband.

Wife: I was planning on Poppleton being here. So could I call him tomorrow? If he can make it?

Court: Well, no, because I've got other things going on tomorrow. If you call Dr. Poppleton, you would probably have to pay Dr. Poppleton to show up ... he'd probably charge you for that.

RP 155.

This exchange amounts to a bait-and-switch. Previously, during the Wife's cross examination of Mr. Foster, the Trial Court had indicated

that the Wife would be able to examine Dr. Poppleton at the appropriate time. The Court stated: “you can ask Mr. [sic] Poppleton what he relied upon and if he relied upon those, took those in consideration, you can ask him questions about that, sure.” *RP* 32. However, when the time came to put Dr. Poppleton on the stand, the Court said no.

The Court’s first rationale for denying the request appears to be that it was too busy. The second is that the Wife could not afford it. Both rationales are an error. In terms of the first rationale, while the Court certainly has the prerogative to manage its schedule, it does *not* have authority to exclude relevant and admissible testimony based solely on its immediate scheduling needs.⁴ The scheduling issues should have been managed in a way that did not affect the Wife’s right to call witnesses and have a fair trial.

In terms of the second rationale, it appears as if Dr. Poppleton was ready to testify the afternoon of trial. During Counsel’s cross examination of the Wife, the Wife testified: “Honestly, I had a conversation with

⁴ The Court’s lack of interest in Dr. Poppleton is in marked contrast to its interest in the Wife’s other expert witness who no-showed. The Wife hired a CPA – Mr. Day – to evaluate the community property business. Per court order, the Husband paid Mr. Day \$1,875 to evaluate the business and produce a report. *RP* 111. When the Court ascertained that Mr. Day did not produce the report, it stated that it had “sympathy for this situation. It seems to me that someone let you down.” *RP* 111. The Court then instructed the Wife to Call Mr. Day, ask him about the status of the report, then report back. *RP* 113. At the very least, the Court should have issued the same instructions to the Wife regarding Dr. Poppleton.

Poppleton this morning,” *RP* 238. It is likely that if Dr. Poppleton was available to converse on the phone with the Wife in the morning, he was also available to testify in court in the afternoon. Dr. Poppleton had already been paid \$13,000 for his work. *Husband’s Fin. Decl.* p. 6. In addition, he had a professional and ethical duty to testify before the court regarding his opinion of the parties’ parenting skills, the family dynamics, and his recommended parenting plan. It is likely he would have discharged that duty had the Court allowed it.

Dr. Poppleton should have been the most important witness in the trial. He was more qualified to make parenting recommendations than Mr. Foster based on his longer-term association with the case and his more advanced academic credential. In addition, he made long-term recommendations regarding the parenting plan, whereas Mr. Foster made only an oblique reference to the long-term. The Court’s failure to hear Dr. Poppleton was an error.

2. The Parenting Plan Should Have Established Conditions Allowing the Wife to Resume Her Role as Primary Custodial Parent, Per the Recommendations of Both Experts and the Court’s Own Oral Findings.

The Residential Schedule, § 3.2 of the Parenting Plan, should have established criteria by which the Wife could resume primary custody.

Both expert reports, in different ways, made such a recommendation. The

Poppleton report recommended that the Wife be given a chance to learn how to manage her emotions and stop involving the children in her fight with the Husband and the Husband's girlfriend. *Poppleton Rep.* 61. If the Wife were able to accomplish this, and demonstrate such accomplishment with "measurable criterion," primary custody should revert to the Wife. *Poppleton Rep.* 61. The Foster report echoes the Poppleton Report, at least faintly, in the final paragraph in the report:

Upon adequate progress, Mr. Burton says he believes Ms. Burton will be able to resume primary residential parenting responsibilities for the children. Should this occur, it is my recommendation that his residential time should be an enhanced version of local court rule.

Foster Rep. 11.

The Court read the reports and agreed with the conclusions. *RP* 302. ("I do agree with the conclusions.") The court also made an oral finding – or at least oral dicta – endorsing these conclusions. *RP* 303 ("I do hope ... we can work toward a more equal parenting plan."). However, despite these statements, the parenting plan contains no provisions whereby the Wife could transition back to the role of primary parent. This is an error.

3. The Findings Regarding the Parenting Plan Should Be Stricken Because They Are Not Based on Substantial Evidence and Are One-Dimensional In Favor of the Husband Against the Wife.

The Court entered four single-spaced pages of findings regarding the Wife's behavior, but virtually none regarding the Husband. Although a few of these findings are based on substantial evidence, many are not. Virtually none of the findings are critical of the father. Thus, the findings are unbalanced and one dimensional, leaving the false impression that the Wife was the primary source of violence and dysfunction and the Husband was a martyr.

Substantial Evidence

Many of the findings have some basis in the record, but are exaggerated. For example, the Trial Court found that: "Ms. Burton has sent thousands of texts bashing Mr. Burton." *CP* 21. However, the record contains evidence of only one text string dated December 12. *RP* 175. This text string contains a handful of texts, far short of the purported "thousands."

Other findings appear to have, at best only a tangential relationship to the record. For example, the Court made negative findings about the father of the Wife's fourth child:

He was/is married and his wife had their second child around the time Ms. Burton had baby Chase. He was fired

in 2006 as a PE teacher at Columbia Adventist School. He was subsequently fired as a personal trainer from Bally's in March of 2009 allegedly because of his relationship with Ms. Burton. He was fired from Lacamas Swim and Sport Club in 2010 allegedly because inappropriate behavior with clients.

CP 21. This finding has virtually no connection whatever to the trial record. The father of the fourth child did not testify. None of the witnesses testified about his work history. In addition, allegations are not findings and should be stricken.

The finding regarding the babysitter is also unmoored from the record. The court found:

In April 2010 Viviane (the family's long time baby sitter) was helping Ms. Burton with the children. Ms. Burton stole Viviane's phone and sent ugly text messages to Mr. Burton pretending to be Viviane. After Viviane realized what was going on she got her phone back and then Ms. Burton physically attacked her.

CP 22. No evidence in the record supports this finding. The babysitter did not testify. None of the witnesses testified about the alleged incident. This finding should be stricken.

One Dimensional

The findings are unbalanced and one-dimensional. The reality is that both spouses engaged in domestic violence and abusive use of conflict. Dr. Poppleton found: "This is a tumultuous case with a history of domestic violence, multiple instances of police involvement, and the

recent arrest and incarceration of both Debbie and Chad.” CP 44. In terms of physical violence, the Husband’s aggression towards the Wife was “more potent” than the Wife’s against the Husband. CP 45.

In addition, the overall tone of the findings is un-judicial. The findings are not numbered such that they can be easily referenced. They are imprecise *e.g.* Chase’s father “was/is married.” CP 21. Most of the incidents referred to in the findings are undated. The prose is interlarded with slang and hyperbole *e.g.* Ms. Burton “conned” Mr. Burton, CP 20, Ms. Burton was “swinging a screaming baby in her arms.” CP 20. Finally, the findings are gratuitous in the sense that they are not related to any provision in the parenting plan, *e.g.* no .191 restrictions. CP 40.

This court should strike all of the findings in the Findings and the Parenting Plan regarding violence between the parties. Most of these findings are not based on substantial evidence. In addition, the tone is not right. The findings should be concise and relevant to the provisions in the Parenting Plan. If the findings are to chronicle the parties’ bad behavior, each incident should be dated and each party should be the subject of appropriate findings. The court’s failure to enter precise and balanced findings was an error.

4. The Decree of Dissolution Should Have Included a Monetary Judgment Against Husband for the Wife's Share of the Community Property.

The Court awarded the Wife half the value of the community property, which was \$157,842.50. This amount should have been reduced to judgment. Any payment plan should have been memorialized with a promissory installment note. Instead, the award is attached to the decree as an amortization schedule. Without a judgment, the amortization schedule is not enforceable. For example, the Husband's bank accounts cannot be garnished. In addition, the amortization schedule has the look and feel of maintenance. This was an error.

5. The Decree of Dissolution Should Have Included a Maintenance Award That Would Have Approximately Equalized Income for Approximately Three Years Commencing with the Date of Entry of the Decree of Dissolution.

The Court made two serious errors regarding maintenance, both of which resulted in a *de minimus* maintenance award. First, the Court effectively conflated future property payments with future maintenance payments. Second, it confused past family support payments with past maintenance. Assuming the Husband's income was approximately \$10,000 / month, the correct maintenance amount should have been \$2,000 - \$4,000 per month for thirty months commencing with the first

full month after trial. Assuming the Husband's income was \$19,000 / month, the maintenance award should have been up to \$8,000 / month.⁵

Property v. Maintenance

During the hearing after the trial, the Court correctly distinguished between the property settlement and maintenance obligation, but the final maintenance award – \$1,000 / month for six months – effectively negates that distinction. The Court concluded that the Husband's installment payment on the property buy-out could not be double counted as maintenance: "I can't ... use that her payment of the value of the business as income to her for purposes of a maintenance award." *RP* 307. This conclusion was based on review of several different cases.⁶ It was correct. Property payments do not count as maintenance. *Marriage of Stenshoel*, 72 Wn. App. 800, 805 (Div. I, 1993).

The Court also concluded that maintenance was required for two and a half years: "We have a twelve-year marriage and I figured that that's probably worth two and a half years of maintenance." *RP* 307. This conclusion was also within the Court's discretion. The rule of thumb for calculating maintenance is one year of maintenance for every four years of marriage. Using this formula, the Wife should have gotten three or more

⁵ See footnote 2 for a discussion of the Husband's income.

⁶ The cases the Court reviewed for the purposes of distinguishing property from maintenance are: *Marriage of Barnett*, 63 Wn. App. 385 (Div. III, 1991), *Marriage of Stenshoel*, 72 Wn. App. 800 (Div. I, 1993), and *Marriage of Janes* (unreported).

years of maintenance. The Court appears to have reduced this amount by at least six months due to the fact that the Wife will not be paying child support.

However, the court then ignored its own conclusion and counted property as maintenance:

He was paying an average of a little over \$2,000 / month for maintenance, and my rationale was that he should pay six more months at \$1,000 a month and that would take care of any maintenance award.

In addition to that, I again accept his proposal that he be paying \$4,500 until the asset's paid off.

RP 308. This mistake is repeated in the written findings, where the Court counts the property payments as maintenance. *CP 16* ("The court finds that six months of maintenance at \$1,000 per month should be sufficient, combined with the \$4,500 per month she will receive for 38 months.").

The Court also made the two and a half year maintenance period retroactive to the day of separation, so, that, in the final analysis, the Wife was only awarded six months of maintenance at \$1,000 / month. *RP 308.* Thus, the Court gave with one hand and took away with another. This was an error.

Family Support v. Maintenance

The Court confused past family support payments with past maintenance. The record does not disclose the exact nature of the

payments the Husband made to the Wife from the day of separation to the day of trial – were they temporary child support, temporary maintenance, or temporary undifferentiated family support? At the hearing after the trial, the Court indicated that the payments were maintenance and then gave the Husband “credit” for the twenty-seven months before trial that he made these payments. *RP* 308.

However, during the Husband’s direct examination, he indicated the payments were “support.” *RP* 100.

Counsel: There was a period of time ... where there was no court order for you to pay support but you were paying support; correct?

Husband: Correct

Counsel: Have you ever not paid her support?

Husband: No.

RP 100. The Findings also indicate that the payments were support, not maintenance. *CP* 17 (“The husband has paid support for twenty seven months, and during some of that time he has been the children’s primary parent.”)

Since the Wife was the primary residential parent during most of the time she received these payments, and the primary residential parent has a statutory right to child support, it follows that the payments were

support, not maintenance. However, the court counted the support payments as maintenance. This was an error.

Correct Maintenance Amount

Based on the statutory factors and the fact that the mother was not paying child support, and assuming the Husband made \$10,000 / month, the maintenance award should have been \$2,000 - \$4,000 / month for thirty months. The first payment should have been due August 1, 2012, the first day of the first full month after entry of the decree. All payments made before August 1, 2012, should have been characterized as both undifferentiated family support and water under the bridge.⁷

In the alternative, if this Court rejects the water-under-the bridge theory and believes that the Husband should receive credit for payments already made, it should distinguish between the maintenance and the child support portions of the payment. The Husband should get credit for the maintenance, but not the child support. Any maintenance should be retroactive to the day of separation, which was the Petition file date.

⁷ In its written findings, the Court undercuts the retroactive maintenance theory. It finds that the mother's stated budget is \$5,470 per month and that the combined maintenance and property payments will enable the mother to meet her budget for six months. CP 16. However, the period of time during which the Wife is entitled to maintenance is thirty months. Therefore, even if the property payments are to be considered maintenance, the Husband should pay the Wife maintenance of \$1,000 per month for another twenty-four months.

Finally, the Husband's monthly income should be reevaluated in light of his federal income tax return and his financial declaration. The wife asserts that the Husband's income was closer to \$19,000 / month than \$10,000 / month/

6. The Day of Separation Should Have Been the Petition File Date.

The Findings establish the day of separation as March, 2009. *CP* 14. This date is based on the husband's bald assertion that the date of separation was March 12, 2009, but contradicted by virtually all the other evidence. The Court also informed the Wife that an earlier day of separation somehow helped her case for maintenance, rather than hurt it. Both the incorrect date and the suggestion that the incorrect date was to her benefit were errors.

Date of Separation

The Day of Separation turns on the specific facts of each case. *Nuss v. Nuss*, 65 Wn.App. 334 (Div. I, 1992). Mere physical separation of the parties does not establish that the parties are living separate and apart. The test is whether the parties, by their conduct, have exhibited a decision to renounce the community. *Nuss* @ 344. The day of separation is when both parties mutually agree to separate or when the non-deserting spouse

accepts the futility of hope of restoration. *Seizer v. Sessions*, 132 Wn.2d 642, 658, 940 P.2d 261 (1997).

The following factors indicate that the parties have not separated:

1) sleeping in each other's [residence] and having sexual relations, 2) leaving personal possessions in the other's [residence], 3) weekend vacations together, 4) attending movies, parties, and work-related social events together, and, especially, 5) any attempted reconciliation. *Nuss* at 345.

Here, the factors indicate that the parties did not separate until the Husband filed the Petition for Dissolution on January 22, 2010. Before that date, while the Husband may have established a separate residence, he also continued to sleep in the house, have sexual relations with the Wife, and trick the family into thinking that he had reconciled with the Wife.

Wife: Did you know that Chad and I were having a romantic – he was staying at the house, living in the house, staying in the bed during that time that he was trying to trick our family into thinking that we had him back into the home?

Mr. Foster: I believe that to be correct.

RP 29. The Husband was well aware of the fact that the Wife did not want to let go of the marriage. In fact, he testified that while he was pretending to reconcile with the Wife, he was having an affair. When the Wife found out she “wanted me back right away.” *RP* 76.

Most important, the parties attempted to reconcile. Because of the attempt at reconciliation, Mr. Foster stopped his investigation. *RP 7*. The Wife believed that the Husband's attempts at reconciliation were in good faith and therefore did not believe that the marriage was over. Her belief effectively tolled the day of separation until the Petition file date, even if, in the Husband's mind, the marriage was over sometime earlier.

Earlier v. Later Date of Separation

The date of separation matters in terms of maintenance and property distribution. One of the primary maintenance factors is the duration of the marriage. *RCW 26.09.090(1)(d)*. The marriage begins with the wedding and ends with the day of separation. Property is also allocated based in part on duration of the marriage. *RCW 26.09.080(3)*.

Here, at the hearing after the trial, the Court told the Wife that the March, 2009 date was better for her than a later date.

Court: Married on – in 1997, July 1997, separated in March 12, 2009. That's the date I was using.

Wife: Well, and you can use that date even though we got back together afterwards?

Court: Well, the fact that you got back together – back together afterwards probably would hurt you more than help you ... part of that 27 months you were together, and yet he was still – he wasn't obligated to make payments to you when you're back together.

Wife: and he didn't.

Court: o.k. But he still paid 54--, so again, he paid you \$54,600 in total since March of 2009. And under the temporary orders, he would only be obligated to pay, again, if you weren't together.

RP 310 – 311. The Court's suggestion that the Wife would somehow benefit from an earlier date of separation, and therefore a shorter marriage, was an error. The Court's other suggestion that the temporary order becomes unenforceable if the parents get back together cannot be evaluated because the order is not in evidence. However, such a provision would be highly unusual. Most orders are in effect until they are modified or vacated.

7. The Wife Should Have Been Awarded Attorney's Fees on the Basis of Need Versus Ability to Pay.

The Trial Court erred when it refused to even consider, let alone grant, the Wife's request for attorney's fees. The wife's first request for attorney's fees was expressed more as a forlorn hope than an oral motion.

During her cross examination of the Husband, she stated:

I was also hopeful with Chad borrowing money from his – from his office, from his business to pay for his lawyers because I was a stay-at-home mom that I would have a chance to have some of that also ... I'm just talking about attorney's costs.

RP 114 – 115. The Court ignored this request. However, the second time the Wife requested attorney's fees was more direct. During the Wife's

direct, the Court informed the Wife that she had the option to request attorney's fees:

Court: What usually happens with someone in your situation – is that their attorney goes into court ... and says, Your Honor, the other side has a lot more money than we do, access to more cash. We wish to be awarded \$2,000, \$3,000 for attorney's fees;

Wife: and I cannot ask for that ...

Court: you can ask for it at this time.

RP 253 – 254.

The Wife then asks for \$12,000:

Wife: I owe my father, what did I say? \$12,000 that I have in debt.

Court: For what?

Wife: Attorney's fees, costs.

RP 256.

The Court then queries the Wife about why her attorney withdrew:

Court: And despite paying all this money, Mr. McCray [the Wife's former attorney] withdrew because of nonpayment, right?

RP 257.

The Court should have at least made findings regarding the Wife's request for attorney's fees. She was eligible for fees on the basis of need versus ability to pay. *RCW 26.09.140*. The Wife was living on \$4,500 per

month in family support payments from the Husband. That was enough to meet her basic needs, but not enough to pay her attorney. In addition, the court later determined that the family support payments essentially doubled as property payments. Under that analysis, her monthly income was zero. She clearly had the need.

The Husband, meanwhile, was making \$10,000 - \$19,000 per month, net, and was ably represented. He paid his attorney almost \$50,000 in fees. *Husband's Fin. Decl.* p. 6. Thus, the Husband outspent the Wife by more than four to one. He had the ability to pay. Even if the Court's refusal to award attorney's fees was within its discretion, its refusal to even consider the request in the first place and to make appropriate findings was an error.

8. The Wife Should Be Awarded Attorney's Fees for the Cost of This Appeal.

This Court should award the Wife her attorney's fees on appeal. The Wife's monthly expenses are \$4,700. *Aff.* Deborah Burton. If maintenance and property are, indeed, apples and oranges, she has no income what so ever. Her attorney's fees on appeal are likely to exceed \$15,000. If she goes back to school as planned, she will need an additional \$16,000 for tuition and books. Finally, the Husband is suing the Wife for claims arising, essentially from the divorce. *Aff.* Debbie

Burton. She cannot afford an attorney for that litigation, though she sorely needs one.

VI. CONCLUSION

This Court should reverse the Trial Court based on two sets of errors. The first set of errors arises from the difference between the Court's oral findings and written orders. The Trial Court's oral findings regarding the residential schedule are not incorporated into the written Parenting Plan. Despite the recommendations of both experts and the Court itself, the Parenting Plan does not establish a pathway for the mother to regain primary custody over the children.

The second set of errors arises from the analytical confusion over apples and oranges. The Husband's payments to buy-out the Wife's interest in the property awarded to him should not be considered maintenance. They should be considered property. In addition, past child / family support payments should not be considered maintenance payments either. They should be considered support payments and not credited towards the total maintenance obligation.

Respectfully submitted, this 14th day of JANUARY, 2013



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Attorney for Appellant

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DIVISION II

2013 JAN 16 PM 2:56

STATE OF WASHINGTON
BY [Signature]
DEPUTY

DECLARATION OF SERVICE

I, Molly Graves, hereby certify and declare under penalty of perjury and under the laws of the State of Washington, the following is true and correct:

I am employed by the Law Offices of O. Yale Lewis III; I am over the age of eighteen (18) years; not a part of the above-entitled action; and I am competent to testify.

On January 14, 2013, I filed and served via electronic mail a true and correct copy of *Brief of Appellant* on the following person(s):

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DATED this 13th day of January, 2013

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